Supreme Court, U. S.
FILED
AUG 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

76-154

NATIONAL LABOR RELATIONS BOARD
v.
HENRY BOOK, WILLIAM RUSS, AND ROBERT KLEIN D/B/A SPRAIN BROOK MANOR
Respondent-Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD N. SCHWARTZ, ESQ.
ATTORNEY FOR PETITIONERS
715 PARK AVENUE
EAST ORANGE, NEW JERSEY

EDWARD A. HALPERN
ON THE PETITION

LEGAL MIMEOGRAPHING SERVICE
190 South Harrison St., East Orange, N.J. 07018
(201) 643-4292 (201) 678-8200

INDEX

	PAGE
Introduction	1
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutory Provisions Involved	3
Procedural and Factual Statement	3
Reasons for Granting the Writ	7
Conclusion	12
Appendix A	1A
Appendix B	4A
Appendix C	18A
Appendix D	28A

AUTHORITIES

CASES:	PAGE
Carey v. Westinghouse Electric Corp., 375 US 261	8
ILGWU v. NLRB, 366 US 731	9
Joy Silk Mills, Inc. v. NLRB 185 F 2d 732	7
NLRB v. C & C Packing Co., 405 F 2d 935.....	9
NLRB v. Gissel Packing Co., 395 US 575	7
NLRB v. Grant, W. T., 199 F 2d 711	7
NLRB v. Horn & Hardart Co., 439 F 2d 674	9
NLRB v. Tower Co., 329 US 324	9
Ramsey V. NLRB, 327 F 2d 784	8
Time D. C., Inc. v. NLRB 504 F 2d 294	8

Introduction

Petitioners Henry Book, William Russ, and Robert Klein D/B/A Sprain Brook Manor (hereinafter referred to as Sprain Book), pray that a Writ of Certiorari issue to review a judgement of the United States Court of Appeals for the Second Circuit which granted the application of the NLRB for enforcement of its order against Sprain Brook and denied petitioners' application for review of the order.

Opinions Below

The decision of the Administrative Law Judge, Melvin J. Welles, in favor of Sprain Brook and dismissing the complaint of the NLRB has not as yet been reported. The decision of the National Labor Relations Board substantially reversing the Administrative Law Judge's decision (with two (2) of the five (5) members of the Board dissenting) has not as yet been reported. Both decisions are reproduced in Appendix A and B to this Petition.

The opinion of the Court of Appeals granting enforcement of the Board's Order has not yet been reported. It is reproduced in Appendix C to this petition.

Jurisdiction

The judgment of the Court of Appeals granting the Board's application for enforcement of its Order against Sprain Brook was entered on May 13, 1976. The jurisdiction of this Court is invoked under 28 USC 1254 (1) and 29 USC 160.

Questions Presented

In February, 1974, Sprain Brook recognized and entered into a collective bargaining agreement with Local 999, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers (hereinafter referred to as Local 999), after that local had satisfactorily proven its majority status through an arbitrator's authorization card check and certification. Thereafter a complaint was issued by the NLRB alleging that Local

Questions Presented (Continued)

999 did not represent a majority of the workers and that therefore Sprain Brook's conduct in recognizing and entering a collective bargaining argeement with them violated Sections 8(a)(1) and (2) of the National Labor Relations Act. The proof offered in support of these allegations was the testimony of a majority of the workers who now stated that they never signed cards for Local 999 despite the signature comparisons and majority certification of the arbitrator. Based on these facts, the following issue is presented:

Whether the Board should have deferred to the arbitrator's certification of majority status based on signature comparisons, irrelevant of the employees' belated contradictory testimony, so long as the record demonstrated that the certification process was fair and regular, untainted by fraud, collusion, serious procedural irregularities or repugnant to the purposes of the Act?

Statutory Provisions Involved

This case involves Section 29 USC 158 (a)(1)(2)(3) and (5) of the National Labor Relations Act, which is set forth in applicable part in Appendix D to this Petition. Sections 8(a)(1)(2) and (3) of the Act are involved because the Board found Sprain Brook's conduct in recognizing and executing a collective bargaining agreement with Local 999 to be violative of these Sections. Section 8(a)(5) is involved because Sprain Brook urges it may well have found itself charged with a violation of this Section if it did not recognize and bargain collectively with Local 999. Accordingly, Petitioner argues that its conduct cannot be considered violative of Sections 8(a)(1)(2) and (3) because if it did not so act, it would have violated another section of the Act.

Procedural and Factual Statement

A hearing was held before Administrative Law Judge Melvin J. Welles, based on the Board's complaint that Sprain

Procedural and Factual Statement (Continued)

Brook violated Sections 8(a)(1) and (2) of the Act by recognizing and entering into a collective bargaining agreement with Local 999. The complaint was issued despite the fact that Local 999. The complaint was issued despite the fact that Sprain Brook's recognition and collective bargaining activity was preceeded by an arbitrator's certification of majority status based upon his comparison of the employees' signatures on the authorization cards to those on their W-4 Forms. Confronted with this court approved method of determining majority status, Sprain Brook had little alternative but to recognize and bargain, or else risk a charge of violating Section 8(a)(5) of the Act.

General Counsel sought to prove its case solely through the testimony of seventy (70) employees who denied ever having signed cards for Local 999. There was no evidence of any fraud or irregularity in the arbitration process or employer tactics of threats or pressure exerted on the workers by Sprain Brook to support Local 999. General Counsel's case, in fact, totally avoided any direct confrontation with the arbitration process of the employer.

Under these facts, Judge Welles felt compelled to dismiss the Complaint. The dismissal was based upon the premise that this type of mathematical proof, incapable of any meaningful cross-examination standing in direct opposition to the arbitration process employed, was not the "kind" of evidence which would suffice to overcome the arbitrator's certification. Judge Welles relied on those principles of law which require that deference be given to an arbitrator's decisions absent proof of fraud or irregularity. The evidence offered rather than addressing itself to the real issues of fraud and/or pressure or persuasion of Sprain Brook, instead sought only to place one piece of evidence which could not be rebutted against another (the certification) which also could not be rebutted. The petitioner herein agrees wholeheartedly with the reasoning of Judge Welles' decision and relies on it in support of its petition.

Whereas Judge Welles refused to consider the testimony offered by General Counsel for the reasons set forth above, a

majority of the NLRB reversed him and did consider it. They concluded that such evidence should be considered since it was the best available. Furthermore, they concluded that it was sufficient to satisfy General Counsel's burden of proof, and was not satisfactorily rebutted by Sprain Brook's proof concerning the arbitration process and certification. The Petitioner asserts that this proof was not the best proof available, but rather all that General Counsel could come up with. The best proof would be testimony indicating employer pressure to support Local 999 or fraud or other irregularity in the arbitration process. Neither was shown, although it would be more relevant than the statement of employees who may have become disenchanted with Local 999 and thus changed their minds. The proof offered merely allowed General Counsel to relitigate an issue previously resolved without requiring them to prove why the earlier decision should be discarded. Nevertheless, utilizing the above rationale, the Board found Sprain Brook's conduct violative of not only Section 8(a)(1) and (2) of the Act, but of 8(a)(3) as well (based on the union security clauses in the collective bargaining agreement). An appropriate order was issued requiring the employer to cease and desist from supporting Local 999 and giving effect to the existing collective bargaining agreement. Reimbursement for all dues previously collected was also required.

Two (2) members of the Board, however, dissented from the majority opinion. Although they too believed that the denials of the seventy (70) employees should be considered, and satisfied General Counsel's burden of going forward, they felt that the proof of the arbitration process and certification satisfactorily rebutted the employees' testimony and ultimately prevented the burden of proof from being satisfied. In discussing their reasoning, they struck upon the very heart of the problem involved in comparing the testimony of the seventy (70) employees to the arbitrator's certification: neither is capable of effective attack. The Board is left in a position where it must speculate as to whether some of the witnesses perjured themselves, or had faulty recall, or the employer, or Local 999 committed forgery, or the arbitrator erred an inordinate amount of

time in comparing signatures. Despite the futility of such a process and the wiser alternative chosen by the Administrative Law Judge (not to consider the seventy (70) witnesses), these two (2) Board members concluded that the credibility of the seventy (70) employees raised more of a question than the credibility of the arbitrator's certification.

The Court of Appeals rejected both the Administrative Law Judge's rationale as well as that of the dissenting members of the Board. In a brief opinion they decided to enforce the Order stating that they adopted the rationale of the majority of the Board.

Petitioner herein asserts that the reasoning of the Administrative Law Judge represents the proper way to proceed and resolve the question presented. The reasons for proceeding in this manner were not only expressed by Judge Welles, but by the dissenting members of the Board themselves, as they perceived the insoluble problem that had to be grappled with once the testimony of the seventy (70) employees was considered.

Reasons for Granting the Writ

The question presented is of profound significance in national labor law. It is well settled under the Labor Management Relations Act that an employer has the duty to recognize and bargain collectively with that labor organization which represents the majority of its employees *NLRB v. W. T. Grant Co.* 199 F 2d 711 (9th Cir. 1954). Moreover, it has been conclusively determined that such majority status may be proven by resort to an authorization card count verified by an arbitrator or impartial third party *Joy Silk Mills, Inc. v. NLRB* 185 F 2d 732 (D. C. Cir. 1950). Consequently, an employer's denial of recognition and refusal to bargain with a union which has obtained signed authorization cards from a majority of employees verified through an arbitrator violates Section 8(a)(5) of the Act. *NLRB v. Gissel Packing Co.* 395 US 575 (1969). Despite the well settled principles described above, the Board here seeks to condemn Sprain Brook for recognizing and bargaining collectively with Local 999 as required by law.

Reasons for Granting the Writ (Conted)

To be sure, an employer's conduct is not to be condoned, where majority status has been secured through his efforts in threatening and pressuring employees, or by resort to the forgery of signatures or through foul play in the certification process. However, where the proofs offered are void of any such evidence, the employer should not be punished for complying with the dictates of the *Joy Silk* and *Gissel* doctrines.

It was the intention of the Supreme Court and the Court of Appeals in *CAREY v. WESTINGHOUSE ELECTRIC CORP.* 375 US 261 (1964), and *RAMSEY v. NLRB* 327 F 2d 784 (7th Cir. 1964), to permit, encourage and support arbitration resolutions of labor disputes and questions. Accordingly, federal courts have consistently declared that deference should be given by the National Labor Relations Board to arbitration resolutions so long as they were arrived at through proceedings which appear to have been fair and regular, untainted by fraud, collusion, serious procedural irregularities, or repugnant to the purposes of the Act, *Time D. C., Inc. v. NLRB* 504 F 2d 294 (5th Cir. 1974).

It is clear then that where the arbitration process has already resolved the question of majority status, and the employer has recognized and bargained collectively with the majority union as required by law, a relitigation of that same issue cannot be had before the Board merely for the asking. To do so would defeat the purpose of judicial support of the arbitration process, and would also preclude any finality in the resolution of issues, a concept which lays at the heart of our judicial system. What is needed is a reason to cast aside the earlier decision and not merely a belated representation by General Counsel that if the issue were relitigated now, they would win. Such was the reasoning of the federal courts in *NLRB v. Tower Co.* 329 US 324 (1946) and *NLRB v. C & C Packing Co.* 405 F 2d 935 (9th Cir. 1969), which declared that Board deference to the arbitrator's certification should have been given. (See also *ILGWU v. NLRB* 366 US 731 (1961), and *NLRB v. Horn & Hardart Co.* 439 F 2d 674 (2nd Cir. 1971),

Reasons for Granting the Writ (Continued)

where the arbitrator's decision was cast aside strictly because of a proven irregularity, fraud, or unfairness.)

No such specific proof of irregularity, fraud, or unfairness exists in the case sub judice or was ever offered by General Counsel. No witness testified as to any foul play in the arbitrator's certification process. No employees testified that the employer threatened, cajoled, pressured, or persuaded them to sign up for Local 999. There was no proof that some of the card signatures were forgeries. Consequently, no direct evidence exists demonstrating that the arbitration certification was improper, unfair, irregular, or repugnant to the purposes of the Act, the needed prerequisites for refusing to give deference.

What is offered is twenty-five (25) employee witnesses who testified that they never signed authorization cards for Local 999 and a stipulation that another forty-five (45) witnesses would make that same representation. Such evidence is very relevant if the issue of majority status is being litigated for the first time. It is almost irrelevant if the issue being litigated (as was the case here) is whether there was irregularity in the arbitration process or the employer's conduct. It then becomes only weak circumstantial evidence offered for the inference that since they claimed they did not sign cards, the card checking process must have been irregular, containing forgeries. However, no such proof of forgery or irregularity is offered.

Once it is acknowledged, as it must be, that the correct issue is "possible irregularity in the card checking process" and not "majority status", it becomes apparent that General Counsel's evidence was insufficient to prove violations of Sections 8(a)(1), (2), or (3) of the Act. To permit such evidence to be considered requires the Board then to speculate without proof between authorization card forgeries, on the one hand, and employee perjury or faulty recollection on the other. To embark on such a choice is clearly harmful to the entire judicial proceeding. This, then, is why the Administrative Law Judge concluded that

Reason for Granting the Writ (Continued)

"the proofs offered were not of the type which could be sufficient to set aside the arbitrator's certification."

The Board and the Court of Appeals here should have more properly been guided by the consistent federal case law discussed above. An employer is bound to recognize and bargain collectively with a union whose majority status has been proven through an arbitrator's card checking certification. That certification must be given deference by the Board in the absence of any proof of fraud, irregularity, or unfairness if the arbitration process is to have a meaningful role in our system and if there is to be any finality in the judicial process. Evidence offered by General Counsel, which merely seeks to reargue the issue of majority status, without presenting direct proof as to why the arbitrator's certification should not be deferred to (other than innuendo), must be deemed either inadequate or improper or both. Thus, in the clear absence of arbitration irregularity, employer threats or pressure, or card signature forgeries, the complaint of the NLRB should have been dismissed and any judgment by the Court of Appeals for enforcement of the Board Order should be vacated.

The Petitioner urges the Supreme Court to grant a Writ of Certiorari here because the judgment of the Court of Appeals for the Second Circuit is in conflict with existing principles and rules of law enunciated in other federal decisions and because a unique and important question of federal law is presented: what is the type of proof which should be considered by the Board in determining whether deference should be given to an arbitrator's certification of majority status?

Conclusion

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

EDWARD N. SCHWARTZ, ESQ.
ATTORNEY FOR PETITIONER
715 PARK AVENUE
EAST ORANGE, NEW JERSEY

Ch.7 LABOR-MANAGEMENT RELATIONS 29 § 158
SUBCHAPTER II—NATIONAL LABOR RELATIONS

§ 158. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii)unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available

to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the

course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 716, 998—September Term, 1975.

(Argued March 30, 1976 Decided April 5, 1976.)

Docket Nos. 75-4223, 75-4243

NATIONAL LABOR RELATIONS BOARD,
Petitioner, Cross-Respondent,

and

LOCAL 1199, DRUG AND HOSPITAL UNION,
RWDSU, AFL-CIO,
Intervenor,
v.

HENRY BOOK, WILLIAM RUSS, and ROBERT KLEIN,
d/b/a SPRAIN BROOK MANOR,

Respondent, Cross-Petitioner.

Before:

KAUFMAN, *Chief Judge,*
OAKES and GURFEIN, *Circuit Judges.*

Petition for enforcement, and cross-petition for review, of an order by the National Labor Relations Board. Enforcement granted; cross-petition for review denied.

PAUL J. SPIELBERG, Washington, D.C. (John S. Irving, General Counsel of the National Labor Relations Board; Elliott Moore, Deputy Associate General Counsel; James M. Hirschhorn, Attorney, on the brief), *for Petitioner, Cross-Respondent.*

United States Court of Appeals (Continued)

BURTON R. HOROWITZ, East Orange, New Jersey (Edward A. Halpern on the brief), *for Respondent, Cross-Petitioner.*

SISPSER, WEINSTOCK, HARPER & DORN, New York, N.Y. (Richard Dorn, of counsel), *submitted a brief for Intervenor.*

PER CURIAM:

On this petition for enforcement and cross-petition for review, the respondent contends that the National Labor Relations Board erred in holding (two members dissenting) that Sprain Brook Manor violated §§8(a)(1), (2), and (3) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1), (2), and (3), by recognizing—and entering into a collective bargaining agreement with—a union that did not represent a majority of the Manor's employees. Although Joseph Wildebush, an arbitrator selected by the union and the Manor without the consent of the employees, concluded after a "card check" that a majority of the workers had authorized the union to represent them, most of the Manor's employees later testified[1] to the contrary at a hearing before an Administrative Law Judge.

For the reasons expressed in the majority opinion of the National Labor Relations Board, ___ NLRB ___ (1975), we grant enforcement of the Board's order. The cross-petition for review is denied.

[1] Twenty-five of the Manor's 101 employees testified orally. The parties stipulated that another 45 employees were prepared to testify "that they did not sign a card for [the union] or in any other way authorize [the union] to represent them . . . ."

[Dated 12/27/74] [JD-797-74
Scarsdale, N.Y.]

Decision
Statement of the Case

MELVIN J. WELLES, Administrative Law Judge: This case was heard at Greensburgh, New York, and New York City, on various dates between September 11, 1974 and October 29, 1974, based on charges filed March 21, 1974, and amended June 5, 1974, and a complaint issued May 23, 1974, alleging that Respondent violated Section 8(a)(1) and (2) of the Act.[1] Briefs have been filed by the General Counsel, the Respondent, and Local 999.

Upon the entire record in the case, including my observation of the witnesses, and upon consideration of briefs, I make the following:

Findings of Fact
I. The Business of the Employer and the Labor Organizations Involved

Respondent is a co-partnership, and is engaged in operating a nursing home and providing related services at its place of business at 77 Jackson Avenue, Scarsdale, New York. During the past year, Respondent received gross revenues in excess of $500,000 and during the same period it purchased goods and services valued in excess of $3,000 from points outside the State of New York. I find, as Respondent concedes, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Charging Party, Local 1199, Drug and Hospital Union, RWDSU, AFL-CIO, herein called Local 1199, and the "Party of the Contract," Local 999, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 999, are labor organizations within the meaning of Section 2(5) of the Act.

[1] The first 2 days of the hearing were conducted by Judge Joseph I. Nachman. When he became unavailable, the undersigned was assigned to the case. The parties agreed to accept the record already made, except for the testimony of two witnesses, whose testimony was stricken.

II. The Issue and the Facts

The sole allegation in this case is that Respondent recognized and executed a contract with Local 999 at a time when Local 999 did not represent a majority of Respondent's employees. The facts show that after Local 999 requested recognition on the basis of an asserted majority of authorization cards, Respondent and Local 999 agreed that the cards would be submitted to an arbitrator and that his determination would be binding. The parties stipulated that 59 cards were submitted to the arbitrator, Joseph Frederick Wildebush,[2] out of a "unit" of 101 employees, that, on February 20, 1974, Wildebush checked these cards against the Form W-4's submitted to him, rejecting two because they bore no signatures, and three because the signatures thereon were printed. On February 21, 1974, he issued a written determination that "the cards did in fact show that a majority of the employees desired representation," based on his examination of them, and stating also that "The similarity of signatures was verified to the best of his ability. This statement is made from his own observation, and not as a handwriting expert." Thereafter, Respondent and Local 999 executed a contract in a unit comprising 77 employees, 24 less than the number against which Arbitrator Wildebush checked the cards. The parties agreed that the General Counsel had the burden of proving "no majority" of both the 77 and the 101 figures, but obviously if the General Counsel carried the burden as to the 101, in the circumstances of this case, he would have carried it as to the 77 as well. There is no dispute as to the foregoing facts.

To prove that Local 999 did not represent a majority, the General Counsel presented the testimony of 70 witnesses, all employees of Respondent at the critical time, each of whom was asked whether she signed an authorization card for Local 999 or otherwise authorized Local 999 to represent him, to which questions, each responded that she had not. Actually,

[2] Wildebush is a member of the American Arbitration Association, the Federal Mediation & Conciliation Service, the New York State Board of Mediation, and the New Jersey State Board of Mediation.

II. The Issue and the Facts (Continued)

only 25 of these 70 witnesses took the stand, but the parties stipulated that the other 45 would each respond "no" to the two questions being asked. As I stated on the record, the fact that 45 of the witnesses did not testify orally could not, and will not, have any effect or bearing on my resolution of this case.

The only other pertinent facts are (1) that Local 999 no longer has the authorization cards submitted to the arbitrator, pursuant to its policy of not keeping cards once recognition and a contract are achieved, and (2) that Local 999 did in fact have two representatives at Respondent's nursing home on three occasions, passing out and soliciting signatures on cards. According to Union Agent Anthony DeFranco, he and the other union agent obtained from 12 to 15 cards in person, and the rest were sent to them by mail.[3]

Viewed simplistically, and that is the way the General Counsel views this case,[4] the fact that 70 witnesses testified that they did not sign authorization cards for Local 999 or in any other manner authorize Local 999 to represent them establishes, unless at least 20 of these witnesses are discredited,

---

[3] The General Counsel in his brief asserts that the testimony of Union Organizer DeFranco discloses that he and another organizer, Yannucci, only spoke with about 45 employees. I do not agree. DeFranco testified that the two organizers made three visits to the Company in which they handed out cards, following an initial visit when no cards were distributed. He gave numbers—totaling about 45—with respect to the first two of these latter three visits, in response to the General Counsel's questions on cross-examination, but was not asked about the third. Nor did the numbers he gave purport to be more than rough estimates. There is thus no basis on the record for concluding that Local 999's organizers did not speak with or distribute cards to many more than the 45 employees the General Counsel claims the evidence shows.

[4] No criticism is intended—the issue is difficult and the General Counsel's position may be correct.

II. The Issue and the Facts (Continued)

that Local 999 did not represent a majority of Respondent's 101 employees on February 21, when arbitrator Wildebush checked the cards, or on February 22, when Respondent recognized Local 999 and signed a contract with it. In that posture, the conclusion that Respondent violated Section 8(a)(1) and (2) of the Act by recognizing a minority union follows inescapably under Bernhard Altmann (ILGWU v. N.L.R.B.), 366 U.S., 731.[5]

Stated otherwise, the General Counsel asserts that the only question before me is one of credibility, and further asserts that there is no conceivable basis for discrediting enough of its witnesses to bring the total of "non-signers" below 51.[6]

---

[5] The General Counsel in his brief adverts to testimony that the organizational activity by the Charging Party, Local 1199, at the Company, preceded the recognition of Local 999. The testimony concerning the activities of Local 1199 was very unclear, and I make no finding with respect to it, particularly because at the hearing the General Counsel explicitly agreed that "for purposes of this case, . . . it is as if 1199 never existed . . ." that his theory of the case was solely that "Local 999 did not have a majority," . . . "with no reference to the fact that 1199 was even on the scene." The General Counsel having taken this theory out of the case, I would not consider it even were the evidence referred to by the General Counsel clearly supportive of it.

[6] I agree that "discrediting" is not a feasible method of resolving this case, and for that reason not only accepted the stipulation that 45 witnesses need not be called as they would testify the same as the 25 who were called, but strongly urged it upon a somewhat reluctant General Counsel. For "discrediting" any particular witnesses on demeanor would not establish that the particular witnesses *did* sign a card. As to the 25 who testified in person, some were cross-examined extensively by Respondent and by Local 999. Although, as to a few of them it might be said that elements of their testimony on cross-examination suggested a lack of candor, the bulk of them were either not cross-examined at all, leaving the record as to them the same as with the 45 whose "testimony" was stipulated, or, having been cross-examined, did not evince any basis for discrediting them.

II. The Issue and the Facts (Continued)

Approaching the case from Respondent's and Local 999's point of view, however, could, just as simplistically, lead to the opposite conclusion. Thus, Respondent and Local 999 having agreed to submit the authorization cards to an arbitrator, who concluded that 54 out of the 101 were valid, they argue that Respondent was obliged to recognize Local 999 at that point, and did so in "good faith," and had it not done so, would have violated Section 8(a)(5) and (1) of the Act. *Snow & Sons*, 134 NLRB 709, enfd. 308 F 2d 687 (C.A. 9). And had Respondent attempted to challenge Arbitrator Wildebush's determination, it would not have been permitted to do so. *N.L.R.B. v. C & C Packing Co.*, 405 F. 2d 933 (C.A. 9).

III. Discussion

Assuming *arguendo* that the General Counsel did "prove" that Local 999 did not represent a majority of Respondent's employees, so as to bring into play the principle of *Bernhard-Altmann*, that does not end the matter. For a number of other principles stemming from the statute, and from Board and Court law interpreting the statute, seem, in the circumstances of this case, to conflict with the principles of *Bernhard-Altmann*. To begin with, *Snow & Sons*, as Local 999 and Respondent correctly state, does provide that a company violates Section 8(a)(5) of the Act if it reneges on an agreement to recognize a union if an arbitrator determines that union represents a majority of his employees. And *C & C Packing*, *supra*, does preclude a company from challenging the determination of majority by the arbitrator. The *Snow & Sons* principle, as amplified by *C & C Packing*, is, in a sense, an outgrowth of *Spielberg*, 112 NLRB 1080, where the Board held, in effect, that it would not go behind the factual determinations of an arbitrator, and would therefore stay its own hand when an arbitration had been held, absent "fraud, collusion, unfairness, or serious procedural irregularities," or unless "the award was

III. Discussion (Continued)

clearly repugnant to the purposes and policies of the Act." *International Harvester Co.*, 138 NLRB 923, 127 enfd., *sub nom Ramsey v. N.L.R.B.*, 327 F. 2d 784 (C.A. 7), cert. denied, 377 U.S. 1003.

It is true that *Snow & Sons* and its progeny are based, in large part, at least, on estoppel grounds, on the theory, that is, that an employer cannot renege on his agreement, but that an outsider such as another union, or the employees themselves, are free to attack the recognition by conventional means, and for an appropriate period. (This "period" would be within 6 months of the recognition, for Section 10(b) would preclude any attack thereafter.) It is also true that the employer's "good faith" in recognizing Local 999 would not, in and of itself, preclude the applicability of *Bernhard-Altmann*, as the Supreme Court explicitly stated therein.[7]

And, with respect to *Spielberg*, the "arbitration" here may well not be the kind of arbitration contemplated therein by the Board, because there was no contractual relationship between Respondent and Local 999, and because the employees, whose rights are directly involved here, neither agreed to nor were represented at, the arbitration. The General Counsel also suggested at the hearing that its proof—70 employees testifying that they did not sign a Local 999 authorization card—establishes a prima facie case of "fraud," in that it demonstrates that at most 31 of the 54 cards found valid by Arbitrator Wildebush were in fact valid, *ergo*, that there must have been 23 invalid cards and therefore Local 999 did in fact perpetrate a "fraud" upon the arbitrator.

---

[7] The General Counsel does not contest Respondent's "good faith," and he agreed at the hearing that, with nothing more, Respondent would have violated Section 8(a)(5) by declining to recognize Local 999 after Wildebush's decision.

III. Decision (Continued)

There is much to be said for each of these opposing arguments. The principles espoused in the various arguments seem to clash head on, which would not be true if either was without plausibility or merit.[8] Having said this, however, does not quite answer the question before me, which of the two arguments should prevail, and whether other considerations, some practical, and some policy, including the fact that the authorization cards presented to Mr. Wildebush no longer exist, should tip the scales one way or another.

Although I realize that many things turn on a "matter of degree," for purposes of determining the legal issues in this case, I propound the following hypothetical, which differs from the instant case only in degree.

Suppose, for example, the General Counsel, in a case otherwise identical to this, presented 51 witnesses who testified they did not sign cards, whereas the arbitrator had found that the union had 51 valid cards out of 101 employees. Without knowing (as we do not know here) which 51 employees purportedly signed cards, there is of course no necessary conflict between 50 of the witnesses and the arbitrator's conclusions with respect to 50 of the cards. If all 51 witnesses are telling the truth, then either one of the 51 cards must have been a forgery, or the arbitrator's mathematics were faulty. If the arbitrator's count was correct, and there were no forgeries, then one of the witnesses must have been mistaken; he may have lied, or forgotten, or just not understood. The difficulty in resolving that hypothetical case is obvious, for there is no one-to-one conflict in the evidence; there is no single individual, that is, whose card is in evidence and who testifies he did not sign it. The conflict lies solely in the totals. For an 8(a)(2) violation to be found, it is necessary to credit all 51 witnesses, and conclude that one of the cards was therefore invalid. Conversely, for the

[8] Arguably, if the arguments on each side were in precise equilibrium, Respondent would prevail, on the theory that the General Counsel carried the burden of establishing a violation.

III. Decision

union to have had a valid majority, it is only necessary to discredit one of the witnesses—for fifty no "votes" creates no conflict with the fifty-one yes "votes." But on what basis could I discredit one out of the 51 witnesses? How could I single out one of the 51 and conclude that this is the one that is lying, or has forgotten, or did not understand? The answer is obvious; I could not. See footnote 6 *supra*.

Although the numbers are different in the case at bar, the problem is the same. For fifty of the General Counsel's witnesses could be telling the truth, could be correct in testifying that they did not sign cards, without destroying the Union's majority. But if any number from 51 through 70 are correct, then the Union did not have a majority, and either from 4 to 31 of the cards found valid by Arbitrator Wildebush were invalid, or the arbitrator miscounted to that extent.

In the hypothetical, it is possible to reason that the likelihood of one forgery, or the arbitrator having miscounted, is probably less than that of one employee forgetting, or not understanding, or even lying. And I would think, in those circumstances, the policy of giving credence to an arbitrator's determination and of permitting a method chosen by the parties to resolve the question concerning representation raised by the Union's demand for recognition should prevail over the possibility that a union one short of a majority status in a unit of this size might be entrenched for as long as three years. With the larger numbers here present, it is hard to say that the same reasoning applies. That 20 employees are lying or mistaken, or have misunderstood, is much less likely than that one would. But that twenty cards were forged is also much less likely than that one was.[9]

To dismiss the 8(a)(2) complaint here because of the difficulty of deciding the factual question whether the union represented a majority would leave Local 999 as the exclusive representa-

[9] With the arbitrator having found 54 valid authorizations, the probability of his miscounting is virtually nil.

tion of the employees, at least until they, or another union, could appropriately (under Board representation case law principles) file a decertification or representation petition, respectively, and might be keeping a union that did not have a majority as the employees' representative. But that, in my opinion, should not shock the conscience. Thus, as far back as 1946 the Supreme Court, in *N.L.R.B. v. A. J. Tower Company*, 329 U.S. 324, refused to permit untimely challenges in a Board election even though the result of the election may well have been different had the late challenge been permitted, as it was based on the allegation that the voter in question was not even an employee of the company. Thus, employee rights are often dependent to some extent on employers, unions, and the following of procedural rules, including *ad hoc* rules adopted by agreement between the parties. It is true that *Tower* involved Board rules and procedures governing Board-conducted elections, and in that sense this case is quite different. But in *Tower*, unlike here, the question of majority raised by the employer was susceptible to easy resolution, had such resolution been permitted, and did not present the kind of difficulty that exists here because of the lack of any one-to-one conflict. Furthermore, other Board principles, that of *Snow & Sons*, *supra*, and *Spielberg*, *supra*, are at least analogous to the Board procedures in representation cases that the Supreme Court held controlling in *Tower* in rejecting the employer's right to show that the union did not have a majority. Indeed, recognition of a union that represented no one at all could not, because of Section 10(b) of the Act, be attacked after 6 months had gone by. *Bryan Mfg. Co. v. N.L.R.B.*, 362 U.S. 411. It is true that this latter invulnerability is statutorily mandated. But the *A. J. Tower* and *C & C Packing Co.* cases were not, yet the possibility of imposing a minority union upon the employees in those cases was, as already noted, not considered significant enough to warrant going behind Board procedures, or those agreed to by the parties.

In sum, the combination of reasons, stemming from cases such as *Snow & Sons*, *C & C Packing*, *A. J. Tower*, and *Spielberg*, that favor setting to rest, and not permitting an

attack upon, the relationship established here following Arbitrator Wildebush's determination, are, in my opinion, more compelling than the reasons advanced for ignoring all these factors, and adopting the simplistic approach of having the 70 not-discredited witnesses carry the day. I do not, in short, regard the General Counsel's "mathematical proof" as the kind of evidence that suffices to overcome the arbitrator's determination that Local 999 had a majority consisting of valid cards.

It is true, as the General Counsel urges, that had Local 999 not destroyed the authorization cards after it had obtained recognition and a contract, we might have had the kind of one-to-one confrontation that would permit a more conventional resolution of this case. For in those circumstances, the General Counsel presumably would not be putting on witnesses comprising a majority of the employee complement to testify that they did not sign a card, but would prevail by putting on 4 witnesses to testify that *their* cards, 4 of the 54, were forged, providing, of course, they were believed.[10]

Perhaps the Board could, and should, as Respondent's counsel suggested at the hearing, enunciate a rule applicable to all cases where recognition is obtained by authorization cards that the cards be kept for the 10(b) six-month period, at the peril of having such recognition attacked as unlawful by the kind of evidence proffered by the General Counsel here. But at the moment no such rule exists. And the uncontroverted testimony of Local 999's business agent, to the effect that the Union does not, as a matter of policy, keep cards once recognition and a contract are obtained, serves to preclude any inference of chicanery or fraud in the destruction of the cards.

I fully realize, as the above discussion should make evident, that my conclusion here (if sustained by the Board and the Courts, of course) might be leaving Local 999 as the employees' bargaining representative despite the strong possibility that

---

[10] Obviously, in such circumstances, the cards themselves would have to be examined, perhaps handwriting experts called to testify, etc.

III. Decision (Continued)

Local 999 did not represent a majority of them when it was recognized. But, aside from the fact that, as *A. J. Tower* suggests, that should not shock the conscience, a decision by me that Respondent here did violate Section 8(a)(2) would, for practical purposes, not achieve a different result, for by the time the case, in that posture, wended its way through the Board, the Court of Appeals, and the centiorari procedures of the Supreme Court, even assuming the General Counsel's position prevailed at every level, we would have approached the time when the union could be unseated, if that is the employees' desire, by conventional means.[11]

This is not a simple case. And my conclusion has not been an easy one to reach. Balancing the conflicting policies that bear on the situation is a task, in the final analysis, for the Board. I can only present my views, for what benefit they may be to the Board, and indicate that to me the balance tips ever so slightly in favor of permitting the recognition by Respondent of Local 999, based on the arbitrator's determination, to stand, as against the testimony of the 70 witnesses who were presented by the General Counsel to testify that they did not authorize Local 999 to represent them.[12] Accordingly, I conclude that the

[11] To the extent that a majority of the employees might wish to escape from the contractual obligation to pay dues to Local 999, they could, of course deauthorize the union from having a union shop.

[12] My determination is strictly limited to the precise circumstances of this case, and the kind of evidence presented by the General Counsel. Cases such as *Hi-Temp, Inc.*, 203 NLRB No. 119, and *Hunter Outdoor Products*, 176 NLRB 449, cited by the General Counsel, are in my view, distinguishable, for in each of those cases it was specifically established that particular cards counted toward the union's majority were invalid, because the specific individuals had signed cards for another union. In short, I am not holding that the Board cannot or should not ever go behind the means selected by the parties for determining majority representation. I conclude only that the presumption of regularity of the arbitrator's determination here has not been overcome by the General Counsel's parade of witnesses—by, that is, his "mathematical proof."

III. Decision (Continued)

Respondent has not violated Section 8(a)(1) and (2) of the Act by recognizing and executing a contract with Local 999.

Accordingly, I issue the following recommended:[13]

Order

The complaint is dismissed in its entirety. Dated at Washington, D.C.

/s/ MELVIN J. WELLES
MELVIN J. WELLES
ADMINISTRATIVE LAW JUDGE

[13] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall as provided in Section 102.48 of the Rules and Regulatons, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

[*Dated 7/30/75*] [*D—9807*
Scarsdale, N.Y.]

Decision and Order

On December 27, 1974, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Teamsters Local 999, Party to the Contract with the Respondent, filed a reply brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Unlike the Administrative Law Judge, we would find that the Respondent Employer violated Section 8(a)(1) and (2) of the Act by recognizing Teamsters Local 999 and Section 8(a)(3) of the Act by executing a collective-bargaining agreement containing a union-security provision with such Union at a time when it did not represent a majority of the employees in an appropriate unit.

The facts in the instant case, as set forth more fully in the Decision of the Administrative Law Judge herein, are not in dispute. Basically, they are as follows. Teamsters Local 999 allegedly obtained 12 to 15 authorization cards in person, and 44 to 47 such cards by mail, from the Employer's employees during mid-February 1974. After a demand for recognition by the Teamsters, the Respondent agreed to submit 59 authorization cards to an arbitrator on February 20, 1974, for a binding decision as to the majority status of the Teamsters among 101 employees of the Respondent. In a letter to the Teamsters and the Respondent, dated February 21, 1974, the arbitrator chosen by these parties noted that he had compared the authorization cards with the employees' W—4 forms and that "the similarity of signatures was verified to the best of his ability . . . from his own observation, and not as a handwriting expert." After rejecting two unsigned cards and three cards with printed signatures, the arbitrator concluded that the cards showed that "a majority of the employees desired representation." Local 1199,

RWDSU, which had conducted an organizational campaign among the Respondent's employees in early February 1974, was not a party to the card check.[1] On February 22, 1974, the Respondent executed a union-security contract with the Teamsters for a unit of 77 employees. Thereafter, the Teamsters destroyed the authorization cards which had been returned to it by the arbitrator. To prove that Teamsters Local 999 did not represent a majority of the Respondent's employees at any pertinent time, the General Counsel at trial produced 70 witnesses who were all employed by the Respondent at the time the Respondent recognized and contracted with the Teamsters. Of the 70 employees, 25 testified on direct examination, subject to cross-examination, that they had never, in any manner, authorized Teamsters Local 999 to represent them. The parties stipulated that the other 45 employees to be called by the General Counsel would testify likewise. A breakdown of the employees who testified that they did not sign authorization cards is set forth below as to the recognition unit and as to the contract unit.

The Recognition Unit

Classification	No. in Unit	No. of Nonsigners
Kitchen	14	8
Physical Therapy Aide	1	1
Maintenance	5	5
Registered Nurses	14	2
LPN's	10	7
Nurses Aides	56	46
Recreational Aide	1	1
Totals	101	70

[1] Our dissenting colleagues assert that we are interjecting a theory of contemporaneous organizing activity on the part of the Charging Party. Teamsters Local 999 allowed such theory to be a part of this case when it refused the General Counsel's offer to stipulate out of the record evidence which relates to this issue.

Decision and Order (Continued)

The Contract Unit		
Classification	No. in Unit	No. of Nonsigners
Kitchen	14	8
Physical Therapy Aide	1	1
Maintenance	5	5
Nurses Aides	56	46
Recreational Aide	1	1
Totals	77	61

In dismissing the complaint herein the Administrative Law Judge rejected the General Counsel's "mathematical proof" provided by "70 not-discredited witnesses," because, in his view, this was "not the kind of evidence that suffices to overcome the arbitrator's determination that Teamsters Local 999 had a majority consisting of valid cards." In support of his conclusion, the Administrative Law Judge notes that the Respondent would have violated Section 8(a)(5) of the Act had it refused to recognize the Teamsters.[2] However, as the Administrative Law Judge also notes, the Supreme Court held in *Bernhard Altmann*[3] that an employer's "good faith" does not preclude a finding that the employer violated Section 8(a)(1) and (2) of the Act by recognizing a union which, in fact, represented only a minority of the employer's employees at the time of the union's demand for recognition.

In further support of his conclusion, the Administrative Law Judge notes that the Respondent was bound by its agreement to submit the authorization cards to an arbitrator, and that the arbitrator's subsequent decision as to majority status of the Teamsters could not, therefore, be challenged by the Re-

[2] The Administrative Law Judge cited *N.L.R.B. v. C & C Packing Company*, 405 F. 2d 935 (C.A. 9, 1969), in support of this prosposition.

[3] *International Ladies' Garment Workers' Union, AFL—CIO [Bernhard Altman Texas Corp.] v. N.L.R.B., 366 U.S. 731 (1961).*

Decision and Order (Continued)

spondent[4] unless the decision was clearly repugnant to the purposes of the Act or unless there was a showing of fraud, collusion, unfairness, or serious procedural irregularities.[5] As an additional comment concerning procedural matters, the Administrative Law Judge noted that the Board has not allowed a party to prove that a union was, in fact, a minority union where the party's failure to follow procedural rules precluded such proof.[6] In this regard, the Administrative Law Judge stated that "employee rights are often dependent to some extent on employers, unions, and the following of procedural rules, including *ad hoc* rules adopted by agreement between the parties." In other words, the Administrative Law Judge seems to be saying that, once the Respondent and Teamsters adopted *ad hoc* rules and procedures to resolve the question of the Teamsters majority status, the Respondent's employees were bound by such rules and procedures so that no challenge to the Teamsters alleged majority status could be made.

However, as the Administrative Law Judge noted, the Board's deferral to an arbitrator's card count is, in large part, based upon theories of contract or estoppel. Such theories are irrelevant to a third party such as Local 1199, RWDSU, which was not a party to the card-check agreement between the Respondent and the Teamsters, and this is especially so when, as here, the arbitrator fails to inquire into the circumstances surrounding the alleged signing of the cards or into the possible

[4] The Administrative Law Judge cited *Fred Snow, Harold Snow and Tom Snow d/b/a Snow & Sons*, 145 NLRB 709 (1961), enfd. 308 F. 2d 687 (C.A. 9, 1962), in support of this proposition.

[5] The Administrative Law Judge cited *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), and *International Harvester Company (Indianapolis Works)*, 138 NLRB 923 (1962), enfd. *sub nom. Thomas D. Ramsey v. N.L.R.B.*, 327 F. 2d 784 (C.A. 7, 1964), cert. denied 377 U.S. 1003 (1964), in 784 (C.A. 7, 1964), cert. denied 377 U.S. 1003 (1964), in support of this proposition.

[6] The Administrative Law Judge cited *N.L.R.B. v. A.J. Tower Company*, 329 U.S. 324 (1946).

Decision and Order (Continued)

presence of another union or unions upon the scene.[7] Moreover, as the Administrative Law Judge noted, the Board in several cases has held that it is not bound by a neutral party's authorization card count where it was shown that particular cards which were counted toward a union's majority status were, in fact, invalid.[8] It is true that in the case at bar no authorization cards exist which would allow a direct affirmance or denial by each employee as to whether he or she signed a particular card. Such conventional proof is not available here because the cards in question were destroyed by Teamsters, Local 999.[9] None-

[7] *Hunter Outdoor Products Inc.*, 176 NLRB 449 (1969), enfd. 440 F. 2d 876 (C.A. 1, 1971); *Allied Supermarkets, Inc.—Allied Discount Foods Division*, 169 NLRB 927 (1968).

[8] The Administrative Law Judge cited *Hi Temp Inc., A Division of Beatrice Foods, Co.*, 203 NLRB No. 119 (1973), 503 F. 2d 583 (C.A. 7, 1974); and *Hunter Outdoor Products, supra.*

[9] Member Kennedy also notes the Board's holding in *Sunbeam Corporation*, 99 NLRB 546, 550 (1952), where the Board stated:

> This Board has also long recognized that authorization cards are a notoriously unreliable method of determining majority status of a union as a basis for making a contract where competing unions are soliciting cards, because of the duplications which then occur.

Moreover, Member Kennedy points to the remarks made by former Chairman Frank W. McCulloch in a speech delivered on October 28, 1965, to the Texas Manufacturers Association entitled, "The Policy, the Purpose and the Philosophy of the NLRB as Revealed in Decision Trends," wherein the former Chairman stated:

> There has been a spate of comment too about the reliance upon authorization cards to establish a union's majority. Now everyone knows, and my public assertions to that effect have been cited far and wide, that honest and free elections are a better test of employee choice than authorizaton cards, with all their known frailties.

Decision and Order (Continued)

theless, in presenting 70 employees who were willing to testify and be subjected to cross-examination as to whether they authorized the Teamsters to represent them, the General Counsel presented the best objective evidence available as to the validity of the cards in question and presented the same type of evidence which has consistently been accepted by the Board as proof as to the lack of majority status on the part of a union.[10] We are unable to see how the arbitration, to which the competing union and the individual employees were not parties, can bar our consideration of such evidence here, even though the Employer might be estopped from raising the issue.

Based upon the foregoing, we would find that the General Counsel has made out a *prima facie* case that neither a majority of the Respondent's employees in the recognized unit nor a majority of the Respondent's employees in the contract unit authorized Teamsters, Local 999, to represent them; that the burden therefore shifts to the Respondent to come forward to establish majority status of the Teamsters; and that, in the

[10] Cf. *Wallace Metal Products, Inc.*, 199 NLRB 819, 827 (1972); *Dixie Cup, Division of American Can Company*, 157 NLRB 167 (1966); *Trend Mills, Inc.*, 154 NLRB 143, 144 (1965); *Imco Container Company of Harrisonburg, a Division of Consolidated Thermo-Plastics Company*, 148 NLRB 312, 314 (1964); *Hudson Dispatch*, 68 NLRB 115, 117 (1946).

Decision and Order (Continued)

absence of such proof by the Respondent.[11] a violation of Section 8(a)(1), (2), and (3) of the Act occurred when the Respondent recognized Teamsters Local 999, and executed with it a collective-bargaining agreement containing aunion-security provision at times when such Union did not represent a majority of the Respondent's employees in an appropriate unit. Accordingly, we would find the violations alleged and issue and appropriate order.[12]

[11] We disagree with our dissenting colleagues' position which is, in effect, that the Respondent has refuted the General Counsel's *prima facie* case, by showing that the arbitrator was presented with 54 valid authorization cards, thus evidencing a majority status by the Teamsters among the Employer's barbaining unit employees. The parties executed a contract in a unit comprised of only 77 employees. Assuming that the 24 employees who were excluded from the unit all signed cards for the Teamsters, only 30 employees of the 54 Teamsters card signers remain. These 30 employees would not constitute a majority of employees in the contract unit of 77. Thus there has been no showing by the Teamsters that they represented a majority of employees in the contract unit of 77 testified, either in person or by stipulation, that they did not sign a Teamsters authorization card.

In addition, 70 employees of Employer's total of 101 employees so testified. We are unable to perceive why our dissenting colleagues apparently credit the testimony of 11 of the 70 witnesses presented by the General Counsel, but do not credit the other 59 who testified that they signed no authorization card for the Teamsters. In any event, it is clear that to accept the result reached by our dissenting colleagues would be to preclude those most directly concerned, the employees involved, from effectively proving their actual desires as to union representation. In light of the Teamsters destruction of the authorization cards, the testimony of individual employees as to whether they actually signed a Teamsters authorization card is the best objective evidence available as to the authenticity of the cards.

Chairman Murphy joins her colleagues in finding that, in the highly unusual circumstances of this case, the General Counsel has presented a *prima facie* case that the authorization cards relied on by Respondent in recognizing Teamsters were invalid. Hence, a violation of Sec. 8(a)(1), (2), and (3) by Respondent has been established. See *International Ladies' Garment Workers' Union, AFL—CIO [Bernard Altmann Texas Corp.] v. N.L.R.B.*, 366 U.S. 731 (1961). The Chairman wishes specifically to note, however, that the violation found may well have been innocently engaged in by the Employer, who appears merely to have accepted a card count made by a well-qualified arbitrator.

Decision and Order (Continued)

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Henry Book, William Russ and Robert Klein d/b/a/ Sprain Brook Manor, Scarsdale, New York, their agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Assisting or contributing support to Local 999, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by recognizing such labor organization as the exclusive representative of any of its employees for the purpose of collective bargaining at a time when there exists a real question concerning representation, or when such labor organization does not represent the majority of employees in an appropriate unit, or in any other maner.

(b) Giving effect to, or in any manner enforcing, the collective-bargaining agreement executed with the aforesaid labor organization on, to wit, February 22, 1974, or to any modification, extension, renewal, or supplement thereto, or any superseding agreements, or to checkoff authorization cards executed pursuant to such agreements, unless and until said labor organization has been certified by the Board as the exclusive bar-

[12] See *The Drackett Company*, 207 NLRB No. 80 (1973).

Order (Continued)

gaining representative of such employees; provided, however, nothing herein shall require Respondent to vary or abandon any wage, hour, seniority, or other substantive features of its relations with its employees which have been established in the performance of such agreements or to prejudice the assertion by employees of any rights they may have thereunder.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement in conformity with Section 8(a)(3) of the Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Local 999, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the representative of its employees for the purpose of collective bargaining unless and until said labor organization has been duly certified by the Board as the exclusive representative of such employees.

(b) Reimburse all present and former employees for all initiation fees, dues, or other moneys paid or checked off since February 22, 1974, pursuant to any renewal, modification, or extension thereof, or pursuant to any checkoff authorizations executed before the date of compliance with this Order.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursement due under the terms of this Order.

Order (Continued)

(d) Post at its plant in Scarsdale, New York, copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing withing 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., July 30, 1975.

Betty Southard Murphy	Chairman
Howard Jenkins, Jr.,	Member
Ralph E. Kennedy,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

---

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

D—9807

MEMBERS FANNING and PENELLO, dissenting:

We do not believe the General Counsel has met his burden of proving by a preponderance of the evidence that Respondent violated Section 8(a)(1), (2), and (3) by recognizing and bargaining with the Union.

The sole issue in this case is whether Respondent violated the Act by recognizing and bargaining with Teamsters Local 999 at a time when that Union allegedly had not been duly selected by the employees as their exclusive representative. The General Counsel alleged that Local 999 was not a majority representative and to prove that fact introduced the testimony of 70 employees who denied that they had signed authorization cards for Local 999 or had in any other manner authorized it to represent them.

Respondent presented evidence that, after Local 999[14] requested recognition on the basis of a claimed majority of authorization cards, it and Local 999 agreed that the cards would be submitted to an arbitrator along with W—4 forms from the Respondent's personnel records which contained employee signatures, that the arbitrator would make a determination as to the Union's majority status, and that such determination would be binding on the parties, a standard and accepted arrangement approved by this Board and the courts on countless occasions. According to a stipulation of the parties to this case, 59 cards out of a unit of 101 employees were submitted to

[14] Local 999 produced evidence that two of its business agents visited Respondent's premise three times, passing out authorization cards to employees on two of those occasions, and that they obtained about 12 to 15 cards in person, and the rest were sent to them in the mail. Local 999 also explained that it no longer had the cards submitted to the arbitrator for it does not as a matter of policy keep such cards after recognition and a contract are achieved.

Arbitrator Wildebush[15] who checked the cards against the W—4 forms, rejecting two because they bore no signatures and three because the signatures were printed, and issued a written determination that based on his observation of the similarity of signature "the cards did in fact show that a majority of employees desired representation." Upon receipt of the arbitrator's determination, Respondent recognized Local 999 and bargained for and executed a contract covering a unit of 77 employees.

We quite agree with our colleagues that the General Counsel's evidence established a *prima facie* case of lack of majority status on the part of Local 999, and that Respondent therefore had the burden of coming forward with the evidence to explain away or refute that case. This we, believe, it has done.

Respondent's evidence is that the arbitrator was presented with cards from a majority of employees authorizing Local 999 to represent them for purposes of collective bargaining, which cards, he, an experienced and reputable arbitrator, found to bear the signatures of employees in the unit. That evidence at the very least suggests that the testimony of some of the employees, testimony neither credited nor discredited by my colleagues, nor by the Administrative Law Judge, was mistaken or based on faulty recollection. Conversely, it is of course possible that the arbitrator failed to detect invalid signatures, and that the employee testimony is entirely accurate and reliable. As the Administrative Law Judge noted, there could have been forgery, on the one hand, or erroneous recollection or even false testimony, on the other hand. Either possibility is, however, entirely speculative, and, accepting all the testimony and evidence at face value, we believe the Respondent has met its burden of coming forth with evidence in refutation of the

[15] Joseph Frederick Wildebush is a member of the American Arbitration Association, the Federal Mediation and Conciliation Service, the New York State Board of Mediation, and the New Jersey State Board of Mediation.

General Counsel's case.[16] As the burden of proving his case by a preponderance of the evidence always remained with the

[16] The General Counsel conceded that his burden was to prove that Local 999 did not have a majority in either the unit of 101 employees for which recognition was demanded and received, or in the 77-employee unit for which a contract was signed. Obviously, if he had proven that a majority in the larger unit had not authorized Local 999 to represent them, he would have also carried his burden as to the smaller unit. Our colleagues, apparently accepting the view that Respondent has come forward with evidence in refutation of the General Counsel's *prima facie* case as to the larger unit, find that it has not done so in the smaller unit. They say that the 24 employees excluded from the larger unit may be assumed to be among the 54 for whom cards were presented to the arbitrator, leaving only 30 in that 77-employee unit as employees for whom cards were also presented. However, of the 70 employees presented by the General Counsel, the names of 11 do not appear on the stipulation setting forth the employees in the contract unit (four more names are similar to but not precisely the same as those of employees who testified that they did not sign cards). Thus, the testimony of at least 11 employees who are stipulated to be part of the 101-employee unit but not in the 77-employee unit is that they did not sign cards for Local 999. Accordingly, our colleagues' assumption that 24 of the 54 cards were signed by employees excluded from the 77-employee unit is contrary to the testimony they would otherwise accept as true. At best, they can assume that 13 of the employees excluded from the contract unit were among those employees for whom cards were presented to the arbitrator. Subtracting 13 from the 54 cards submitted to the arbitrator leaves 41 cards from employees in the 77-employee contract unit. The situation is thus the same for both units. The General Counsel has presented testimony from a majority of employees denying they had signed authorization cards for Local 999. Respondent has introduced evidence that an arbitrator was presented with cards from a majority of unit employees which he found to be valid cards.

General Counsel[17] and we do not believe his evidence preponderates in favor of finding Local 999 was a minority union at the time it was recognized by Respondent unless one indulges in impermissible speculation, speculation, for example, that Local 999 perpetuated a fraud upon the arbitrator, we would dismiss the complaint.[18]

It seems to us that henceforth any employer who accepts an arbitrator's or neutral third party's decision with respect to the majority status of a union will act at his peril. Dated, Washington, D.C. July 30, 1975.

John H. Fanning, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

[17] The General Counsel has not attacked the competency of the arbitrator to determine the issue submitted to him by the parties. Indeed, he specifically disclaimed any reliance upon a theory that contemporaneous organizing activity by the Charging Party made it improper for the Respondent and Local 999 to resolve the question of representation without the participation of the Charging Party. His sole theory is "that Local 999 did not have a majority." Our colleagues, however, seek to interject that issue into the case. The Charging Party filed its charge a month after the events in issue.

[18] It is of course possible, but not proven, that dismissal of the complaint would impose a union not selected by the employees as their representative. However, they have the right to deauthorize any membership obligation which may be included in the contract and to vote the union out at the end of the contract if they are dissatisfied with the representation they have been given.

Supreme Court, U. S.
FILED
OCT 1
MICHAEL RODAK, JR., CLERK

No. 76-154

In the Supreme Court of the United States

OCTOBER TERM, 1976

HENRY BOOK, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
JAMES M. HIRSCHHORN,
Attorneys,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-154

HENRY BOOK, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4A-5A) is reported at 532 F. 2d 877. The decision and order of the National Labor Relations Board (Pet. App. 18A-31A) are reported at 219 NLRB No. 148.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1976. The petition for a writ of certiorari was filed on August 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly refused to give conclusive effect to the

results of a third-party authorization card check in determining whether a union represented a majority of petitioners' employees at the time that petitioners recognized the union.

STATEMENT

Petitioners are members of a partnership that operates Sprain Brook Manor Nursing Home in Westchester County, New York. In February 1974, Local 999, International Brotherhood of Teamsters ("the Union") claimed, on the basis of signed authorization cards, to represent a majority of petitioners' employees (Pet. App. 18A). By agreement between petitioners and the Union, the cards were inspected by an arbitrator, who concluded "from his own observation, and not as a handwriting expert" that a majority of petitioners' employees apparently had chosen the Union as their collective bargaining representative (Pet. App. 18A).[1] On February 20, 1974, petitioners recognized the Union as representative of a unit composed of all kitchen employees, maintenance employees, physical therapy aides, recreation aides, nurses' aides, licensed practical nurses and registered nurses, and two days later petitioners and the Union executed a contract covering a unit of these employees except registered nurses and licensed practical nurses.[2] The contract contained a union shop provision (Pet. App. 19A).

Less than a month after petitioners and the Union had executed the collective bargaining agreement, Local 1199, Drug and Hospital Union, filed an unfair labor practice charge against petitioners, alleging that they had recognized the Union at a time when the Union did not represent a majority of their employees. At the hearing held on Local 1199's charge, 70 employees, constituting a majority of the workers in both the unit recognized by petitioners and the unit covered by the contract, testified that they had never signed authorization cards for the Union or otherwise authorized the Union to represent them (Pet. App. 19A). The authorization cards were not presented at the hearing, having been destroyed pursuant to the Union's policy of not keeping cards once recognition and a contract had been achieved (Pet. App. 18A-19A).

Based on this evidence, the Board found that petitioners had recognized the Union at a time when it did not represent a majority of their employees, in violation of Section 8(a)(2) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. 158(a)(2) (Pet. App. 23A-24A). The Board also found that petitioners had violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), by entering into a union shop agreement with a union that did not represent a majority of the employees (Pet. App. 24A-25A). In reaching its conclusions, the Board held that the authorization card count—to which neither Local 1199 nor the employees had been a party—was insufficient proof that a valid card majority existed on February 20 in the face of the employees' contrary testimony and the absence of the cards (Pet. App. 21A-23A).

The Board therefore ordered petitioners, *inter alia*, to cease supporting the Union and giving effect to the contract, to withdraw recognition from the Union unless and until it was duly certified by the Board, and to reimburse employees for any union dues or fees paid under the contract (Pet. App. 25A-27A). The court of appeals enforced the Board's order in a *per curiam* opinion (Pet. App. 4A-5A).

---

[1] Fifty-nine cards out of a unit of 101 employees were submitted to the arbitrator, who verified 54 of the cards (Pet. App. 7A).

[2] The contract unit consisted of only 77 employees (Pet. App. 19A).

ARGUMENT

The law is clear that it is a violation of Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), for an employer to recognize a union that does not in fact represent a majority of the unit employees even though the employer may have believed in good faith that the union had obtained majority status. *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731, 738-739. Thus, the sole issue presented here is whether the Board properly refused to accord conclusive weight to the authorization card check in determining the Union's majority status on February 20. That issue, which rests on the particular facts of this case, does not warrant further review.

The Board's decision to accept the unrebutted testimony of petitioners' employees rather than the results of the card check was within its discretion. First, the employees testified—subject to cross-examination—within a short time after petitioners had recognized the Union, and the number of workers who denied ever supporting the Union was substantially more than half of the recognized or contract unit. Moreover, as the Board noted (Pet. App. 24A, n. 11), the contract unit was considerably smaller than the bargaining unit for which cards were submitted.[3] Finally, in light of the fact that the Union had destroyed the best evidence—the authorization cards—it would have been inequitable to have relied solely on the card check

[3]Although the card check was conducted in a unit of 101 employees, the contract unit contained only 77 employees. Since the cards were destroyed by the Union, there was no way of knowing which names were on the 54 cards validated by the arbitrator. If only 16 of the card signers had been members of the groups excluded from the contract unit, the remaining 38 signers would have constituted a minority of the 77-employee contract unit.

in ruling against the employees or Local 1199 in circumstances where neither had agreed to or participated in the check.[4]

Contrary to petitioners' contention (Pet. 6-8), the Board's decision is not inconsistent with the deference normally paid to the arbitral process in unfair labor practice proceedings.[5] This case does not involve grievance arbitration, but rather the evidentiary weight to be given the results of a third-party card check in the absence of the cards themselves. In any event, the Board frequently declines to defer to arbitration where, as here, neither the employer nor the union is aligned in interest with the affected employees, since in such cases the employees are not actually represented at the arbitration proceeding. See *T.I.M.E.-DC, Inc.* v. *National Labor Relations Board*, 504 F. 2d 294, 302-303 (C.A. 5); *Kansas Meat Packers*, 198 NLRB 543, 544.[6]

[4]Contrary to petitioners' contention (Pet. 5), an employer who, like petitioners, has committed no other unfair labor practice has no duty to agree to a card check. Where an employer has committed unfair labor practices which preclude the possibility of a fair election, the Board may issue a bargaining order based on authorization cards which have been verified in a Board proceeding. *National Labor Relations Board* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 610-611.

[5]When an arbitration award resolves a factual question common to both a grievance arising under a collective bargaining agreement and a Board proceeding, the Board will ordinarily defer to the award "unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness or serious procedural irregularity or that the award was clearly repugnant to the purposes of the Act." *International Harvester Co.*, 138 NLRB 923, 927, affirmed *sub nom. Ramsey* v. *National Labor Relations Board*, 327 F. 2d 784 (C.A. 7), certiorari denied, 377 U.S. 1003. See also *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261.

[6]See also *National Labor Relations Board* v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 136-137, where this Court held that in a proceeding arising under Section 10(k) of the Act, 29 U.S.C. 160(k), the Board correctly declined to defer to an arbitration procedure that had not been agreed to by all interested parties.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
JAMES M. HIRSCHHORN,
Attorneys,
National Labor Relations Board.

OCTOBER 1976.

DOJ-1976-10